

A Swap By Any Other Name: The Third Circuit Sides With Kalshi In High-Stakes Fight Over Who Regulates Prediction Markets



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Those who bet on the CFTC in the [high-stakes fight](#) over who will regulate sports-related event contracts just hit pay dirt. At least for now, bettors will remain free to buy swaps contracts on licensed exchanges such as KalshiEX LLC tied to things such as the [number of Knicks playoff games](#) [Timothée Chalamet will attend](#).

Last month, a divided panel of the United States Court of Appeals for the Third Circuit [agreed](#) that Kalshi was likely to succeed in its argument that the [Commodity Exchange Act](#) gives the [Commodity Futures Trading Commission](#) exclusive jurisdiction over sports-related event contracts traded on CFTC-licensed designated contract markets, or DCM, preempting New Jersey's state gambling laws.

Kalshi is a financial services company operating a DCM licensed by the CFTC. On Kalshi's exchange, users can buy and sell "event contracts," which are financial instruments whose value depends on whether a specified event occurs. Users can, for example, take positions on whether a sports team will win a game, or on how many games a given celebrity will attend, with payouts tied to the outcome.

New Jersey's Division of Gaming Enforcement sought to enforce New Jersey's gambling laws against Kalshi's sports-related event contracts, but Kalshi maintained that its sports-related event contracts qualify as swaps under the CEA, giving the CFTC exclusive jurisdiction. The district court agreed with Kalshi and preliminarily enjoined New Jersey. The Third Circuit agreed with the district court (and Kalshi) in a split 2-1 decision that could foretell how the Supreme Court may rule.

The Third Circuit Majority: Sports-Related Event Contracts Are Swaps Because Under The Plain Language Of The CEA The Outcomes Of Sports Contests Have Economic Consequences For Stakeholders

The Third Circuit majority concluded that Kalshi's sports-related event contracts fall under the exclusive jurisdiction of the CFTC because they fit the CEA's definition of "swaps" and there is a conflict between the CEA and New Jersey's laws such that New Jersey's laws cannot apply.

The CFTC regulates DCMs offering a "swap," which is defined by the CEA as "any agreement, contract, or transaction . . . that provides for any . . . payment[] or delivery . . . that is dependent on the occurrence or

nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence."

The majority found that the district court did not clearly err when it held that Kalshi's sports-related event contracts fall within the CEA's definition of "swaps." "Numerous stakeholders," the Third Circuit reasoned, are affected by the outcomes of sporting events, including "sponsors, advertisers, television networks, franchises, and local and national communities."

With that blithe observation—which did not address, for example, proposition bets on specific events within games, such as what kind of pitch a pitcher will throw next, or how many games a celebrity will attend, with no obvious economic consequence—the majority wrote that the "analysis need not go further."

Having found that sports-related event contracts are swaps, the majority easily concluded that both field and conflict preemption applied, preempting New Jersey's gambling laws both because the CFTC has exclusive jurisdiction over swaps and because allowing New Jersey to regulate these contracts

would conflict with the CFTC's ability to do so.

The majority noted that while the CFTC has the discretionary power to review and prohibit six categories of contracts if it concludes they are "contrary to the public interest," including contracts involving "gaming," the CFTC has not yet acted to prohibit sports-related event contracts.

The Dissent: Kalshi Offers Gambling Products That States Should Regulate

Judge Roth's dissent disagreed with the majority's analysis and concluded that "[b]ecause Kalshi is facilitating gambling, it can be subjected to state regulation."

According to the dissent, the contracts Kalshi offers are "virtually indistinguishable" from betting products offered by online sportsbooks, covering outcomes, point spreads, and player performance. Rebranding those products as "event contracts" does not change their essential nature.

Gambling, the dissent emphasized, has long been regulated by states under their police powers, with federal law playing only a limited and supplementary role. Courts therefore should not find that states cannot have overlapping regulations absent a clear and manifest congressional intent to override state control.

The dissent criticized the majority's reasoning for failing to take the presumption against preemption

seriously. According to the dissent, the majority defined the relevant field regulated by the CFTC too narrowly, focusing on sports-related event contracts on DCMs rather than the broader domain of gambling.

The dissent separately critiqued the majority's analysis of whether sports-related event contracts qualify as swaps. By the majority's reasoning, the dissent observed, "even a bet over the outcome of a friendly neighborhood ping pong match may have a 'potential financial . . . consequence' because one of the bettors would reap a financial reward," and because trading swaps outside of DCMs is illegal, any individual making such a bet would be committing a felony.

Ultimately, the dissent wrote, "the question of whether sports-event contracts are swaps is a thorny issue with the potential to radically upend the legal landscape governing the gambling industry, and I am not convinced the Majority's analysis does the issue justice."

The Ninth Circuit Appears Skeptical

On April 16, 2026, just ten days after the Third Circuit sided with Kalshi, the Ninth Circuit, [hearing consolidated arguments](#) in cases involving Kalshi, Robinhood, and Crypto.com, signaled at least skepticism of the Third Circuit's conclusion. Each member of the panel appeared to express concern regarding the claim that sports-related contracts fall within the

CEA's definition of swaps. All three members of the panel questioned whether Congress intended to prevent states from regulating sports betting regardless of its form. Judge Nelson said: "Explain to me the difference between a sports bet that happens in Caesars and a sports bet that happens [on a prediction market platform]," noting that Kalshi itself has called its contracts sports gaming. A decision is forthcoming.

Next Steps

If the Ninth Circuit diverges from the Third Circuit, the split could be enough to trigger Supreme Court review. (My colleagues and I surveyed the ongoing litigation in [this article](#) published earlier this month in *The Review of Securities and Commodities Regulation*.) In any event, sooner or later, the Supreme Court may have to step in. For now, there is little certainty about how the litigation will play out. What makes the litigation unpredictable, in part, is the degree to which one of the central debates—whether sports-related event contracts qualify as swaps—cannot be readily answered by reference to the plain text of the CEA.

The Third Circuit majority made an obvious point when it observed that the outcomes of sporting events have potential financial, economic, or commercial consequences—fitting the definition of swaps—because they affect stakeholders such as sponsors, advertisers, television networks, franchises, and local and national communities. The dissent

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made an equally obvious point when it observed that the outcome of a neighborhood ping-pong match also can have economic consequences, potentially, albeit less significant ones. Where is the line between sports-related event contracts with economic consequences and those without? The New York Knicks winning an NBA title surely would have potential economic consequences for local business; me winning a game of HORSE with a colleague would not (unless we wagered, and even then just minimally); but what about a bet on whether Timothée Chalamet will attend “at least 9” Knicks playoff games (a bet available right now on Kalshi)? Does Chalamet’s attendance at 9 as opposed to 8 or 10 games have a potential economic consequence? What about a bet on whether Chalamet would win a neighborhood ping-pong game? (Kalshi right now offers at least some 30 purported swaps relating to Chalamet in one way or another.)

The CFTC’s website explains that event contracts have essentially two purposes: they “can be used to hedge, to offset real-world risks,” and they can be used for “speculation,” as “a way for traders to seek profits by taking risks.” But this all-purpose explanation ignores the difference between sports-related event contracts and those in other markets. While some futures markets exhibit a mix of hedgers and speculators (who can provide liquidity to each other), it is

not at all clear that the sports-related event contract market attracts a meaningful number of hedgers. Is a purely speculative market covering bets such as the number of Knicks games Timothée Chalamet will attend really a swaps market?

Will Timothée Chalamet attend the Supreme Court arguments if one of the Kalshi cases makes it there? I wouldn’t bet on it. But others will be able to, unless the CFTC or Congress steps in.